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APPEAL

# In the District Court of the United States for the Western District of Missouri, Western Division

In Equity No. 2328 and Related Cases Nos. 2329–78

F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, DEFENDANTS

**STATEMENT OF DEFENDANTS, PURSUANT TO THE PROVISIONS OF RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, SHOWING THAT THE SUPREME COURT HAS JURISDICTION TO REVIEW UPON APPEAL THE FINAL DECREE AND ORDER OF THE DISTRICT COURT DATED JUNE 18, 1938**

## I

These appeals arise in connection with fifty individual suits (consolidated by stipulation of the parties for the purpose of presentation, trial, and other proceedings therein) which were brought by market agencies doing business at the Kansas City Stockyards (herein referred to as "petitioners") to suspend, enjoin, set aside, and annul an order dated June 14, 1933, made by the Secretary of



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Agriculture in a proceeding entitled *Secretary of Agriculture* v. *L. B. Andrews, doing business as L. B. Andrews Livestock Commission Company, et al.*, Bureau of Animal Industry, Docket No. 311, instituted under the Packers and Stockyards Act, 1921 (7 U. S. C., c. 9, Sections 181–229; c. 64, 42 Stat. 159 *et seq.*).

Section 316 of the Packers and Stockyards Act (7 U. S. C., Section 217) provides:

> For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168).

The applicable provisions of the laws relating to suits brought to suspend or restrain the enforcement of orders of the Interstate Commerce Commission and to appeals from orders or decrees made in such suits are found in Title 28, U. S. Code, Sections 44, 47, and 47a (Act of Oct. 22, 1913, c. 32, 38 Stat. 220). Section 47 provides for a hearing by a three-judge court upon an application for an interlocutory injunction to sustain or restrain the

enforcement of orders of the Interstate Commerce Commission; and further provides:

> * * * and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

Section 44 provides that the procedure in the district courts in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in Sections 45, 45a, 46, 47, 47a, and 48. Section 47a provides in part as follows:

> A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases.

Section 238 of the Judicial Code as amended (28 U. S. C., Sec. 345, Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 936, 938) provides that the Supreme Court has direct appellate jurisdiction to review the final decree of a district court made pursuant to Section 316 of the Packers and Stockyards Act of 1921 (7 U. S. C., Section 217).

II

The constitutionality of the provisions of the Packers and Stockyards Act of 1921 is not involved.

III

The date of the final order and decree sought to be reviewed is June 18, 1938. The application for appeal was presented on 6-30, 1938.

IV

On June 14, 1933, the Secretary of Agriculture, acting under the applicable provision of the Packers and Stockyards Act of 1921, found that certain rates and charges theretofore filed with him by the petitioners herein as market agencies at the Kansas City Stockyards, at Kansas City, Missouri, were unjust and unreasonable and ordered that on and after July 24, 1933, certain specified rates and charges found by the Secretary to be just and reasonable should constitute the maximum rates and charges to be collected and charged by such marketing agencies for services rendered at said Kansas City stockyards in buying or selling livestock.

The petitioners instituted individual suits to suspend, enjoin, set aside, and annul the Secretary's order. A statutory three-judge court was assembled. On July 22, 1933, that court entered a temporary restraining order enjoining the enforcement of the Secretary's order and providing that

petitioners should deposit with the Clerk of the Court, "pending final disposition of this cause, the full amounts by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary." The temporary restraining order was extended from time to time thereafter, and the impounding continued until November 1, 1937, when a new schedule of rates, agreed upon by the Secretary of Agriculture and the market agencies, became effective. Approximately $586,000 have been paid into the registry of the Court pursuant to the terms of the temporary restraining order. The question which the defendants seek to have reviewed by the Supreme Court relates immediately to the disposition of this money.

After a final hearing the petitions were dismissed by a decree entered by the District Court on June 15, 1935. An appeal was taken to the Supreme Court by the petitioners and on May 25, 1936, the decree of the District Court was reversed and the cause remanded for further proceedings in accordance with the opinion of the Supreme Court. *Morgan et al.* v. *United States et al.*, 298 U. S. 468.

The cause was reheard by a statutory three-judge court which, on July 9, 1937, entered a final decree again dismissing the petitions. A second appeal was taken to the Supreme Court. On April 25, 1938, the Supreme Court held that the hearing

given to the petitioners by the Secretary was "fatally defective," and that "the order of the Secretary was invalid" and reversed the decree of the District Court. *Morgan et al.* v. *United States et al.*, 58 Sup. Ct. 773. In its opinion the Supreme Court said, "We express no opinion upon the merits."

On May 20, 1938, defendants filed a petition for rehearing in the Supreme Court. In that petition defendants called the Supreme Court's attention to the fact that there had never been an adjudication as to the reasonableness of the maximum rates and charges which were fixed by the Secretary of Agriculture in his order of June 14, 1933, and that, pursuant to the temporary restraining order entered by the District Court on July 22, 1933, there was impounded in the registry of the District Court a large sum of money which represented the excess of the rates and charges collected by petitioners over and above the rates and charges found to be reasonable by the Secretary of Agriculture in his order of June 14, 1933. The Supreme Court was requested to indicate what disposition should be made of the said moneys impounded in the registry of the District Court. The petition for rehearing was denied on May 31, 1938, by a *per curiam* opinion in which the Supreme Court stated (82 L. ed. 1031–1032):

> We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the

District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

On June 1, 1938, the Secretary of Agriculture made an order reopening the proceedings in the matter entitled *Secretary of Agriculture* v. *L. B. Andrews, doing business as L. B. Andrews Livestock Commission Company et al., Market Agencies, doing business at the Kansas City stockyard, Kansas City, Missouri.* This order provided that the "Proceedings, Findings of Fact, Conclusion and Order," as issued by the Secretary of Agriculture on June 14, 1933, should be served upon petitioners as the tentative findings of fact, conclusion, and order of the Secretary, and that the petitioners should have thirty days to file exceptions to the said tentative findings of fact, conclusion, and order. It was further provided that petitioners should have opportunity to make all appropriate motions or objections with respect to further proceedings.

On June 11, 1938, defendants filed in the District Court a motion praying that all further proceedings in this matter be stayed and that the Clerk of said Court be directed to retain in his custody the impounded moneys until such time as the Sec-

retary should have entered a final order in the proceeding reopened by him pursuant to the order of June 1, 1938. On the same day petitioners filed with the District Court a motion praying that the Clerk of said Court be directed forthwith to restore to petitioners the impounded moneys. After a hearing on June 11, 1938, the District Court, on June 18, 1938, entered a decree enjoining, setting aside, and annulling the Secretary's order and filed a *per curiam* opinion overruling defendants' motion and sustaining petitioners' motion. In an order filed contemporaneously therewith and dated June 18, 1938, the District Court "ordered, adjudged, and decreed" that the impounded funds be distributed forthwith to petitioners. It is this order and decree which the defendants seek to have reviewed by the Supreme Court.

## V

The grounds upon which it is contended that the questions involved upon this appeal are substantial are as follows: The excess charges now impounded in the registry of the Court, were collected only by virtue of the District Court's interlocutory stay issued on July 22, 1933, and thereafter from time to time renewed. Section 305 of the Packers and Stockyards Act expressly makes it unlawful for any market agency to collect rates which are unjust, unreasonable, or discriminatory. By his order of June 14, 1933, the Secretary found that the rates which petitioners had been collecting

were unjust, unreasonable, and discriminatory, and determined what were just and reasonable rates. The amount of the impounded moneys represents the amount by which the rates which petitioners have collected exceed the rates found by the Secretary to be just and reasonable. Until such time as there has there been a determination by some court that the Secretary's finding that the existing rates were unjust, unreasonable, and discriminatory was not justified by the evidence before him, petitioners' patrons have a clear equity in the funds now impounded. The effect of the District Court's ruling, ordering immediate distribution to petitioners, is to cut off the equity of their patrons without any adjudication as to whether or not petitioners in collecting rates which the Secretary has found to be unreasonable were acting legally within the terms of Section 305 of the Packers and Stockyards Act.

The final order and decree of the District Court herein effectively deprives the Secretary of Agriculture, because of an exclusively procedural error, of any opportunity to exercise the power, sought to be exercised in his order of June 14, 1933, to prescribe as of that date reasonable rates and charges for the services of petitioners at the Kansas City Stockyards. The effect of such final order and decree is to enable the petitioners to collect and to reduce to ownership charges whose reasonableness has been continuously in controversy since prior to June 14, 1933, without any

determination having been made that the charges are reasonable and without any opportunity having been afforded to obtain an authoritative determination as to their reasonableness. No decision of the Supreme Court of which defendants are aware has ever held that the substantive provisions of the Packers and Stockyards Act, or of any other similar regulatory statute, may thus be suspended by order of court and their enforcement ultimately defeated solely because of a failure to observe procedural safeguards established by law. No decision of the Supreme Court of which the defendants are aware, under the Packers and Stockyards Act or any other similar regulatory statute, warrants the conclusion of the District Court, which is implicit in its final order and decree, that the appropriate remedy for a failure to observe procedural safeguards established by law is an immunity from the substantive requirements of law rather than a right to have the requisite procedural safeguards observed. The final order and decree of the District Court herein is believed to be in direct opposition to Section 305 and other provisions of the Packers and Stockyards Act.

The Secretary of Agriculture, in reopening this proceeding by his order of June 1, 1938, has proceeded upon the theory that it is his duty under the Packers and Stockyards Act and under the decisions of the Supreme Court in this case to correct the procedural defect which invalidated the origi-

nal order and to make a proper determination as to whether the rates which petitioners have collected are the lawful and reasonable rates. The defendants submit that under the applicable provisions of the Packers and Stockyards Act the Secretary has the authority, in the circumstances of this case, to make an order in the reopened proceeding fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937. A contrary conclusion would necessarily mean that a mere procedural defect in an administrative proceeding, even though it has been corrected without prejudice to the rights of the parties, can foreclose and destroy substantive rights.

If there is any question as to whether or not the applicable statutes permit the Secretary to reopen this proceeding and make an order fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937, that question should be determined by the courts after the Secretary has acted and in a proceeding which properly presents the issue. The effect of the District Court's order restoring the moneys to petitioners is to adjudicate the questions of the rights of petitioners and petitioners' patrons in the impounded funds, and the authority of the Secretary of Agriculture to reopen the proceedings, in a suit in which those questions are not properly before the Court.

The defendants submit that the *per curiam* opinion of the District Court and the final order and decree entered thereon are inconsistent with the mandate of the Supreme Court under which the District Court's action was taken. In its memorandum opinion denying defendants' motion for rehearing, the Supreme Court stated that the questions as to the distribution of the impounded money "are appropriately for the District Court and they are not properly before us on the present record"; and that:

> What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

and remanded the case to the District Court "for further proceedings in conformity with our opinion." The District Court now takes the position that the interlocutory orders under which the impounded funds were accumulated must be interpreted as providing that the funds should belong to the petitioners in the event that the Secretary's order of June 14, 1933, should be held invalid. Those interlocutory orders were included in the record before the Supreme Court. If, as the District Court now holds, the terms of those orders necessarily require the conclusion that the impounded funds now belong to the petitioners, it

may be assumed that the Supreme Court would have so held and would have expressly stated that any further action by the Secretary would be irrelevant.

Even if it should be found that the District Court was correct in holding that the Secretary is without power to reopen this proceeding and make an order fixing reasonable rates and charges for the period between July 24, 1933, and November 1, 1937, the order of the court directing distribution of the moneys to the petitioners without determination by the District Court as to the reasonableness of the rates under which the moneys were collected would be erroneous. The reasonableness of these charges has been continuously at issue in litigation. The action of the District Court in restoring the proceeds of the charges to the petitioners, without any opportunity having been afforded to obtain a determination as to their reasonableness, is in direct opposition to the command of Section 305 of the Packers and Stockyards Act, and permits the court's own processes to be utilized as a means of escape from the substantive obligations involved.

The prayer for reversal is deemed by the defendants to be justified under the decisions of the Supreme Court of the United States in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; *Morgan et al.* v. *United States et al.*, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed.

1031, and other pertinent decisions of the Supreme Court of the United States.

## VI

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *B. & O. R.R. Co.* v. *United States et al.*, 279 U. S. 781; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301; and *Morgan et al.* v. *United States et al.*, 297 U. S. 468, No. 581 October Term 1937, decided April 25, 1938, No. 581 October Term 1937, decided May 31, 1938, 58 Sup. Ct. 773, 82 L. ed. 1031.

Respectfully submitted.

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THURMAN ARNOLD,
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WENDELL BERGE,
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# IN THE UNITED STATES DISTRICT COURT

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

*Opinion of the Court*

Filed Oct. 29, 1934

OTIS, District Judge, delivered the opinion of the Court:

These are fifty-nine cases in equity contemporaneously initiated in this Court, submitted together and now for decision after final hearing. The prayer of the petition in each case is for injunctive relief against the enforcement of a certain order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for stockyard services rendered by the petitioners at the Kansas City Stockyards in Kansas City, Missouri.

The business of each of the petitioners is that of a livestock selling and buying (or marketing) agency. It is a business affected with a public interest whose rates and charges for services rendered by it to its patrons are subject to governmental regulation. Since the business of each of the petitioners directly affects commerce among the several states Congress is authorized by the Constitution to legislate touching such rates and

charges. Congress has done that in the so-called Packers and Stockyards Act (42 Stat. L. 163), providing in that Act that such rates and charges shall be such only as are reasonable and delegating to the Secretary of Agriculture the function and power of determining what rates and charges are reasonable. The validity of this legislation has been determined by the Supreme (fol. 173) Court (*Tagg Bros.* v. *United States,* 280 U. S. 420) and is not questioned in these cases.

The Packers and Stockyards Act provides that—

> SEC. 310. Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> (a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, to be charged and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

Pursuant to the provisions of the Act the Secretary of Agriculture on his own initiative on April 7, 1930, ordered an inquiry into the reasonableness of the rates and charges of the petitioners for stockyard services rendered by them. A hearing followed before an examiner designated for that purpose. Testimony was taken by him which fills 6,721 typewritten (fol. 174) pages in addition to which 159 exhibits were offered in evidence. Followed an oral argument before an "Acting Secretary of Agriculture." Thereafter, on May 18, 1932, the Secretary of Agriculture issued an order fixing the maximum rates and charges. A petition for rehearing was granted July 15, 1932. At the rehearing conducted by an examiner testimony was taken which fills 3,091 typewritten pages in addition to which 111 exhibits were offered in evidence. Followed a second oral argument before an "Acting Secretary of Agriculture." There-

after, on June 14, 1933, the Secretary of Agriculture made and issued findings of facts and the order based thereon fixing rates and charges which is now attacked. A petition for a rehearing as to this order was denied.

The rates and charges of petitioners which were in effect on June 13, 1933, and which the Secretary held were unreasonable were in the form of a fixed charge per head of livestock bought or sold, the charge varying with the kind of livestock and with the number of animals involved in any transaction. Thus, for selling calves the charge was thirty cents per head for a consignment of from 1 to 20 head and twenty-five cents per head for all over 20 head. The maximum charges ordered by the Secretary were in the same form. For illustration, the Secretary's order required that the maximum selling charge as to calves should be: thirty-five cents per head in a consignment of one head, twenty cents a head in a consignment of from 1 to 40 head, five cents per head for all over 40 head.

We preface with this brief preliminary statement our (fol. 175) consideration of the issues.

In so far as the subject yet has been developed in judicial opinions there are possible only five attacks on such an order as that with which we are here concerned, and the petitioners have made all of them save one. They are: (1) That the statutory procedure was not followed; (2) that the findings do not support the order; (3) that the findings are not supported by the evidence; (4) that errone-

ous rules of law were followed to reach the findings; (5) that the rates and charges fixed in the order are confiscatory and so violative of constitutional rights. *Tagg Bros.* v. *United States, supra; Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 454.

THE PROCEDURE

1. Before the Secretary lawfully can make an order of this character he must accord a "full hearing to the interested parties." Sec. 310 of the Act. In the petitions it was alleged that a full hearing was denied in that: (1) each and every of the petitioners was denied a separate hearing; (2) that the Secretary of Agriculture in person did not hear arguments on the evidence but without authority in law delegated that duty to assistant secretaries designated as Acting Secretaries; and (3) that the Secretary signed the order without reading the evidence. On a preliminary hearing we sustained a motion to strike these allegations from the petitions. We think it is unnecessary now to elaborate (fol. 176) the obvious observation that the theory of these allegations is supported by nothing in the Act and that a construction of the Act consistent with that theory would destroy it altogether as a measure capable of practical administration.

FINDINGS SUPPORT ORDER

2. The Secretary made 162 findings of fact upon the evidence heard at the original hearing and at the rehearing. No contention is made but that

these findings support the order. Unquestionably they do support the order and that fully.

FINDINGS SUPPORTED BY EVIDENCE

3. The business of a livestock agency is of a personal service character requiring little invested capital. To arrive at what are reasonable rates and charges for the services rendered by such an agency at a given place, as at the Kansas City Stockyards in Kansas City, Missouri, the following factors must be considered: (1) the total volume of business to be transacted; (2) the number of men required for the efficient handling of that business; (3) the reasonable cost of handling the business, including reasonable compensation of the men necessarily employed and other necessary and proper costs; (4) the capital investment required for the efficient handling of the volume of business reasonably to be expected; (5) what is a proper return on the capital so invested; (6) what is a reasonable compensation for management and a reasonable profit. The findings made by the Secretary included all of these factors (fol. 177) and every other conceivable factor necessary to be considered. Some of the findings are challenged as contrary to the evidence.

Save possibly where the issue of confiscation is for determination, the settled rule is that the findings of the Secretary in a proceeding of this character "must be accepted by the court as conclusive, if the evidence before him was legally sufficient to

maintain them." *Tagg Bros.* v. *United States et al.*, 280 U. S. 420, 444. The court is not concerned with the weight of the evidence, with whether its judgment concurs with that of the Secretary, but only with the question: is any finding essential to the order under review unsupported by any substantial evidence?

With this rule in mind, we have gone to the record, with the aid of briefs submitted, and have found therein substantial testimony to support every challenged finding, nor do we find any justification for the contention of petitioners that in arriving at his findings material and relevant evidence was ignored. The important and essential findings, such as, for example, how many hogs an efficient salesman should sell in a given time, what are reasonably compensatory salaries salesmen should receive, what costs are legitimate and what unnecessary, what wastes may be eliminated, indeed almost every finding that was made except those which were merely statistical, clearly depend upon the application to the testimony of the judgment of him charged with the duty of making findings. That duty the law imposes on the Secretary. We cannot overturn his judgment as to such matters when there is evidence to support his findings.

### CLAIMED ERRORS OF LAW

It is true that such an order as the one here attacked must be set aside if it rests upon an erroneous rule of law. *Tagg Bros.* v. *United States,*

280 U. S. 420, 442. The petitioners assert the applicability of this principle to these cases, but just what erroneous rules of law the petitioners claim were applied by the Secretary we have had some difficulty in gathering from the petitions and briefs notwithstanding the great labor able counsel for petitioners obviously have given to their preparation.

There is no contention that the subject matter sought to be regulated was not within the Secretary's jurisdiction under the statute and no allegation, therefore, of any such fundamental legal error as a misinterpretation of the statute would have been. The contentions, as best we can state them (they purport to be set out in Subdivision VII of each of the petitions), are the following:

A. The costs used by the Secretary were arrived at arbitrarily and in disregard of the facts. Clearly this is not a matter of applying an erroneous rule of law, but a matter of whether the evidence supports the findings.

B. The Secretary ruled rightly that the reasonable rates to be fixed should include a profit but erroneously that compensation allowed for management and the carrying of uninsurable risks included the element of profit whereas the cost of management and of carrying uninsurable risks are legitimate expenses and the petitioners are entitled to something additional as profits. The answer to the contention is that if it be conceded that it was

error to rule that the allowance for management and the cost of carrying uninsurable risks necessarily included all the profit to which an owner is entitled in truth the rates fixed had an additional spread, above all costs, including the two specified, which spread allows and provides for the alleged omission.

C. The Secretary rightly ruled that the petitioners were entitled to a return on capital investment, but erroneously excluded any allowances for going concern values. Such is the contention. The evidence whereon the contention is based is to the effect that the methods and practices used by the petitioners were worth (not what they had cost) $66,401. The contention is that a return should be allowed on that amount. The view of the Secretary was that while knowledge of these methods and practices was indispensable anyone is free to use them and they are not property. Such knowledge is a part of the necessary mental equipment of those rendering livestock selling and buying service. Compensation for the service includes full return for the use of the knowledge of methods and practices. It is not an element of capital investment. We agree.

D. The Secretary erroneously excluded from consideration of costs various legitimate classes of expenses, such as insurance against normal risks. We find in the record no support for this contention.

E. Various other contentions are made in this connection which we think present no errors of law.

CONFISCATION

Each of the petitioners claims that the order of the Secretary violates the due process clause of the Fifth Amendment in that it deprives him of his property without due process of law. Whether the presence in these cases of this issue of confiscation entitles the petitioners to the independent judgment of the court as to the law and the facts after a consideration of all of the testimony heard by the Secretary and also additional testimony offered before this Court, never has finally been decided by the Supreme Court. *Tagg Bros.* v. *United States,* 280 U. S. 420, 443. The view that those alleging confiscation are entitled to the independent judgment of the court is supported by such cases as *Ohio Valley Water Works Company* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Bluefield Water Works Company* v. *Public Service Commission,* 262 U. S. 679, 689; *Prendergast* v. *New York Tel. Co.,* 262 U. S. 43, 50; *Lehigh Valley R. Co.* v. *Board of Public Utility Com.,* 278 U. S. 24, 36; *United Railways & Electric Co.* v. *West,* 289 U. S. 234, 251; *Phillips* v. *Commissioner,* 283 U. S. 589, 600. The view that even where the issue of confiscation is present, findings of fact made by the Secretary, if supported by substantial evidence, are conclusive, is supported by a consideration of the text of the Interstate Commerce Act to which the Packers

and Stockyards Act refers and by *United States* v. *Louisville and N. R. Co.*, 235 U. S. 314, 320; *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547, and the dissenting opinion in *Ohio Valley Water Works Co.* v. *Ben Avon Borough*, 253 U. S. 287, 297, as well as by the declination of the Supreme Court to pass upon the matter in *Tagg Bros.* v. *United States*, 280 U. S. 420, 443. Whichever of these views is the correct one, it is certain that there is a strong presumption in favor of the findings made by the Secretary as well as those of any rate making body. *Darnell* v. *Edwards*, 244 U. S. 564.

If we proceed on the view that the findings of the Secretary are conclusive, if supported by any evidence, and we have determined that each of them is supported by substantial evidence, then the contentions of petitioners as to confiscation must be resolved against them with the exception of one of those contentions. All of the contentions, excepting one, are based upon the theory that the Secretary's findings as to costs are contrary to the weight of the evidence and that if correct findings were made the costs allowed in fixing rates and charges would be so much greater than those which were allowed as that it would conclusively appear that the rates and charges fixed in the Secretary's order did not adequately provide for costs and so are confiscatory. If, however, having decided that the findings of the Secretary are sustained by substantial evidence, we are bound by his findings,

then we are bound also to conclude that the Secretary's order makes full allowance for all reasonable costs in the rates and charges fixed by the order. The one contention as to confiscation not thus disposed of is that the rate of return allowed by the Secretary's order on invested capital of petitioners, which is 6% on fixed capital and 7% on working capital, as a matter of law is confiscatory. We regard that contention as without merit.

If we adopt the view that, having raised the issue of confiscation, the petitioners are entitled to the independent judgment of this court based upon all of the evidence which was before the Secretary, as well as the additional evidence offered at the trial of these cases. Only presuming that the findings of the Secretary are correct, the same conclusion touching this issue is reached by us. Such an examination of all of the testimony as reasonably can be made, in view of its immense volume, we have made, reaching the conclusion that the essential findings made by the Secretary not only are sustained by substantial evidence but are in accordance with the weight of the evidence. Since those findings are right as to costs and since the rates and charges fixed by the Secretary's order adequately provide for costs and for a return on invested capital and for profits as to all petitioners who have shown that their agencies are efficiently conducted, the issue of confiscation must be resolved against the petitioners.

OTHER MATTERS

Contentions of the petitioners which have not been referred to specifically in this opinion have received the consideration of the Court and are resolved against the petitioners.

FINDINGS OF FACT

In each of these cases we make findings of fact as follows:

1. The order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates and charges for petitioners as livestock selling and buying (marketing) agencies in the Kansas City Stockyards, Kansas City, Missouri, was made after full hearings accorded the petitioners, and each of them, and upon findings of fact made by the Secretary based upon the evidence taken at the hearings.

2. The findings of fact made by the Secretary of Agriculture upon which the order of June 14, 1933, was based are supported by substantial evidence.

3. Upon an independent consideration of the evidence, including the additional evidence taken by the Court at the trial of these cases, the Court adopts as its findings of fact the findings of fact made by the Secretary, and by reference incorporates them herein.

CONCLUSIONS OF LAW

The Court concludes as matters of Law:

1. That the order of the Secretary of Agriculture, dated June 14, 1933, fixing maximum rates

and charges for livestock buying and selling (marketing) agencies at the Kansas City Stockyards in Kansas City, Missouri, was made by the Secretary after a full hearing in all respects conforming with the requirements of the Packers and Stockyards Act.

2. That the order is fully supported by the findings of fact made by the Secretary and that those findings were based upon substantial evidence and are supported by the weight of the evidence and are not based upon any erroneous rules of law.

3. That the maximum rates fixed by the Secretary in the order are reasonable and that they do not take the property of petitioners, or any of them, without due process of law in violation of the terms and provisions of the Fifth Amendment to the Constitution of the United States.

INDICATED DECREE

Counsel for the defendants will prepare and submit to the Court for approval and entry in each of these cases a decree dismissing the plaintiff's bill and assessing the costs against the plaintiff.

IN THE UNITED STATES DISTRICT COURT

Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

*Concurring Opinion*

Filed Oct. 29, 1934

VAN VALKENBURGH, Circuit Judge, concurring:

I agree with the decision to dismiss the bills, but I feel impelled to add some additional views with respect to some features of the findings made by the Secretary of Agriculture in reaching the conclusions leading to his order.

The reason, or at least the main reason, for the difference between petitioners and Secretary, lies in the matter of cost allowances and reasonable return to owners of the business. As stated by counsel for the Secretary, the substantive questions are:

1. Are the Secretary's findings of reasonable costs plus reasonable profits supported by the evidence?

2. Will the prescribed rate schedule produce sufficient revenue to cover the reasonable costs plus reasonable profits as found by the Secretary?

I think we may regard the entire controversy as resolved by an answer to the first of these questions, because the second is practically conceded, the insistence being that the Secretary's allowance of costs is unreasonable and, therefore, that the resulting profits are so unreasonable as to amount to confiscation.

To my mind, basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure. One even casually familiar with stockyard operations knows that an efficient salesman must be a man of sound judgment and experience. His duties in fostering the business of the producer, in causing his product to be reared and brought to sale under favorable market conditions, are of great value and are not subject to mathematical percentage measurement. The stock does not come in such regular periods as to permit a fixed amount of sales, ratably distributed over the market year. When it does come it must be attended to by expert and experienced men to the best advantage of the grower. It is evident, therefore, that an organization must be kept sufficient to handle the business as it is presented. Such employees must be permanent for this purpose. Capable men cannot be picked up at will. They must have a steady job, and at a wage that will reasonably compensate for the experience they bring

and the services they perform. In this period, when it is emphasized that labor must receive a fitting reward, it will not do to visit upon the stockyards agencies, which are recognized as necessary to the commerce, too great a burden because of depression in the stock business. In their zeal to aid the stock raiser, government agencies must not forget the men who are essential to the making of his market. This applies in a lesser degree perhaps to yardmen and others employed in the business. It is to be emphasized that, if a market agency is to do business at all, it must have and maintain an organization sufficient to handle its business when it comes. An examination of record and briefs indicates that in various ways the agencies have striven to keep costs down. Obviously, it was to their interest to do so in years lean at the best. Their judgment as to their necessities should not be lightly set aside nor underestimated.

So with respect to getting and maintaining business. Certainly a considerable amount of advertising, circularizing, and personal contact is proper and necessary to keep this market prominently before the raisers and shippers of stock in this normal trade territory. The market agencies have to compete with other stock markets, with cooperatives, a percentage of whose profits go back to their members, with packers, and railroad yards, and with direct buyers generally. The fact that there may incidentally result competition between

the agencies themselves is no sufficient ground for reducing the costs of such activities to an extremely narrow compass. Also, if such agencies are to continue, the owners, as they are termed, must be allowed to receive a return commensurate with the contribution they make to the success of this market and the risks they assume.

I do not undertake to decide that the costs demanded by petitioners may not in some degree be excessive. Of course, even the most valuable operators cannot expect to make as much out of a small volume of business as out of one much larger; but they must be prepared for any reasonable eventuality, and the return fixed must not be so low as to drive too many of these agencies out of business, to the great injury of this stock-market, and, necessarily, to the shippers of stock, who would most conveniently patronize it. What the future volume of business may be is, of course, speculative, and should not be a controlling rate-making factor. The evidence is that the volume is decreasing during the periods under test. It appears that the order of the Secretary would reduce the number of men employed in handling the 1931 market from 188 to about 79. There were only fifty-nine firms originally petitioning. Nine are said to have retired from business, and, from the evidence before us, a number of others will necessarily follow.

It is true that no reasonable rate can be expected to protect all who may elect to engage in this quasi-

public business, without regard to prevailing conditions; but the protection of the market against lowering an irreducible minimum is as necessary to the public interests as it is to that of the stock shippers themselves.

My reaction to the presentation made is that I should have made a more liberal allowance for costs and owner return, not necessarily as great as that demanded by petitioners, and, of course, with due regard to the number of owners accredited to each firm. Five owners in the same firm cannot each expect to receive the maximum accredited or appraised to one. But it is to be observed that the Secretary has given consideration to all the elements essential to the computation of a general rate of this nature. By the statute he is given almost dictatorial power in the establishment of such rates, provided he gives due consideration to all the elements involved, does not depart from any rule of law, and provided, further, the rates established are not clearly unreasonable and confiscatory.

Just what would be the result of applying those rates to future business upon a reasonable cost basis, or as found by the Secretary, cannot be known, because it has not yet been tried. We cannot bring to the complex conditions involved the same expert judgment as is employed by what the Supreme Court has described as "a tribunal appointed by law and informed by experience." And we are forbidden to question the soundness of the

reasoning, or the wisdom of the conclusions reached, and to substitute our judgment for that of the findings and conclusions announced. I think the attack of petitioners is directed, in its last analysis, to the soundness of the conclusions reached, and I fear that we have no power to disturb them upon the showing made. Renewed application to Secretary or Court may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it. In this view I concur in the decision to dismiss the bills.

## IN THE UNITED STATES DISTRICT COURT

*Opinion ~~for~~ on Petition for Rehearing*

Filed June 20, 1935

VAN VALKENBURGH, Circuit Judge: In support of the petition for rehearing counsel for petitioner urged the following criticisms of the order of the Secretary of Agriculture:

1. The Secretary employed an unreasonable arbitrary and illegal method in finding total unit costs through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for rate-making purposes, in disregard of actual experience, basing rates upon hypothetical considerations and assumed conditions, contrary to the provisions of the Packers and Stockyards Act, which requires the public livestock market to be maintained as a competitive market.

2. It is necessary to consider the individual market agencies rather than to standardize all under a common mathematical rate base, irrespective of such conditions as are essential to a competitive public market.

3. This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to

weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restrictions of the agencies enabled to operate profitably.

4. The Secretary's order eliminates essential competitive costs.

5. With this elimination agencies cannot compete at a profit. This is shown by a comparison with the new costs as applied to actual business operations during the test period.

6. The *Tagg* case does not apply to the situation here.

In the *Tagg* case the court upheld an order of the Secretary in which he used typical experience as his guide for determining reasonable costs for rate-making purposes. Typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration. In this case the Secretary employed hypothetical costs based not upon present but upon assumed conditions which he expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees. I said:

> Basing the allowance of salaries upon the potential ability of a salesman to sell a given number of carloads in a year is too restrictive. Such ability is not subject to bare mathematical measure.

Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by petitioner as stated above. Furthermore, I think the drastic reduction of advertising and other costs, essential to getting and maintaining business, gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken, and ultimately to destroy, this market by diverting business to other more favored markets and agencies, and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market, but equally to the shippers of stock who would most conveniently patronize it. I find myself in full agreement with Judge Wilkerson in the case of *Acker* v. *United States,* recently decided in the District Court for the Northern District of Illinois. He says:

> I do not concur in the findings of This Court which adopt in toto the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore,

in the entry of the decree dismissing the bill.

I am, therefore, constrained to vote to deny this petition for rehearing in the hope that a renewed application to the Secretary may bring relief if reasonable experience, based upon the conditions imposed by the Secretary's order, is found to justify it.

I fully concur in the foregoing Memorandum.

ALBERT L. REEVES,
*United States District Judge.*

**In the District Court of the United States for the Western District of Missouri, Western Division**

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In Equity No. 2328 and Related Cases Nos. 2329–78

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F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, DEFENDANTS

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Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

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OTIS, District Judge, delivered the opinion of the Court.

The principal question now presented in these cases (the cases involve the validity of an order made by the Secretary of Agriculture fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards) is whether the Secretary, before he made the order which is attacked, gave the plaintiffs such a hearing as they were entitled to by law. That question is presented following a remand of the cases after an appeal. The cases, consolidated

for trial, had been tried and were adjudged by this court (8 F. Supp. 766). The Supreme Court reversed our decree and remanded the cases for the determination of the question "whether plaintiffs had a proper hearing." 298 U. S. 468. As an introduction to our discussion of that question we here incorporate the first and certain other paragraphs of the opinion of the Supreme Court.

> The proceeding [1] was instituted by an order of the Secretary of Agriculture in April 1930 directing an inquiry into the reasonableness of existing rates. Testimony was taken and an order prescribing rates followed in May 1932. An Application for rehearing, in view of changed economic conditions, was granted in July 1932. After the taking of voluminous testimony, which was concluded in November 1932, the order in question was made on June 14, 1933. Rehearing was refused on July 6, 1933.
>
> Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The district court of three judges entered decrees sustaining the order and dismissing the bills of complaint. Motions for rehearing were denied and, by stipulation, the separate decrees were set

[1] That is, "the proceeding" which resulted in the Secretary's order fixing rates.

aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal.

The Supreme Court then indicated in its opinion the questions raised on the merits, after which the opinion continues:

> Before reaching these questions we meet at the threshold of the controversy plaintiff's additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, Sec. 310; 7 U. S. C. 211):
>
> "SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> "(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case, or the maximum or minimum, to be charged, and what regulation or practice is or will be just, reasonable,

and nondiscriminatory to be thereafter followed; * * *."

The allegations as to the failure to give a proper hearing are set forth in Paragraph IV of the bill of complaint, * * *. The allegations in substance are:

That separate hearings were not accorded to the respective respondents (plaintiffs here). That at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to acting secretaries the determination of issues with respect to the reasonableness of the rates involved. That when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture and the appointment of any other person as acting secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding and had not heard

or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the district court struck out all the allegations in Paragraph IV of the bill of complaint and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

* * * * *

The outstanding allegation, which the district court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

The other allegations of the stricken paragraph do not go to the root of the matter. * * *

1. The essence then of the assertion of failure of the Secretary of Agriculture to give to plaintiffs that full hearing to which they were entitled is that the order under review was made by the Secretary "without having heard or read any of the evidence and without having heard the oral arguments or

having read or considered the briefs which the plaintiffs submitted." That "outstanding allegation" now has been denied. Evidence has been heard. Not only has it not been proved that the Secretary did not read any of the evidence nor *hear* the oral arguments, nor read and consider the briefs which plaintiffs submitted, but exactly the opposite has been proved. The Secretary did read parts of the transcript of the testimony; he did *hear* (not with his ears but by reading) the oral arguments, he did read and consider the briefs submitted by plaintiffs. These things have been proved unless indeed we shall reject the testimony of the Secretary of Agriculture as incredible. That alternative, absent a much stronger showing than is here, is not to be thought of in connection with the testimony of an honorable and distinguished head of a great executive department of the federal government.

The Supreme Court has not said that it was the duty of the Secretary of Agriculture to hear or read *all* the evidence and, *in addition thereto,* to hear the oral arguments and to read and consider briefs. If the Supreme Court had said that it would have meant that the Packers and Stockyards Act cannot be administered. It is entirely impracticable to administer it if it imposes such a duty on the Secretary personally. Consider that in this very case the transcript of the oral testimony fills 13,000 pages. The Exhibits, several hundred, fill more

than 1,000 pages. A narrative statement of just a part of the oral testimony fills 500 printed pages. Learned counsel for plaintiffs assert indeed that they do not mean to contend that the Secretary personally must have read all of this mass of testimony. Such a contention could not be maintained. Let it be frankly stated now that the judges of this court, whose duty it was to consider the case *de novo* (since it involved constitutional issues), did not read all this testimony. We think, moreover, that it may be predicted with some assurance that all this testimony will not be read by the justices of the Supreme Court when, as they must, they consider the cases on the merits.

It is the testimony of the Secretary of Agriculture that he *heard* the oral argument (*by reading it*) and that he read the briefs. It is his testimony that he gave consideration to the findings of fact (they were 180 in number and filled more than 100 printed pages). It is his testimony that he examined to some extent even the voluminous transcript of the oral testimony and the exhibits. He had besides the benefit of a discussion of the oral testimony and exhibits by trusted assistants who had read every line and examined each exhibit. That full hearing which the law required did not demand that he should do more. Evidence taken by an examiner, as the evidence here was taken, "may be sifted and analyzing of the evidence by his subordinates." This court has found that those

findings not only are supported by some evidence, *but also that they are supported by the weight of the evidence.* Upon its own independent consideration of the evidence this court arrived at the same findings as those which were reached by subordinates of and by the Secretary. The Secretary, however, had much more than the findings. Other subordinates who had read all the testimony and examined all exhibits, discussed and reviewed the whole evidence with the Secretary.

The Supreme Court's meaning when it said that the evidence might be "sifted and analyzed by competent subordinates" for the Secretary is robbed of all practical significance and value when interpreted as by plaintiff's counsel, who say that evidence cannot be *sifted and analyzed* unless, as to any controverted issue, the testimony on both sides is set out either in full or in epitome. It seems to us that such an interpretation disregards the true and natural meaning of the words "sifted" and "analyzed." The very purpose of "*sifting* and *analyzing*" evidence is to extract from it the pure gold of truth—the real and ultimate facts.

If, however, testimony is not "sifted" and "analyzed" unless as to any controverted issue the testimony for and against a given conclusion is presented, are plaintiffs in a position to contend that the Secretary did not have the benefit of a summary of the testimony most favorable to plaintiffs? Did not plaintiffs incorporate a summary of

the testimony in oral arguments and briefs? The Secretary read a transcript of the oral arguments and he read the briefs. If in them counsel omitted to epitomize the testimony most favorable to their contentions can they challenge the fullness of the hearing on that account? A defendant even in a criminal case scarcely would be heard to challenge either the fairness or fullness of the hearing accorded him, let us say on a motion for a new trial, if he did not so much as direct the attention of the court to the evidence in his favor.

FINDINGS OF FACT

As to the issue made by the answer to Paragraph IV of the bill and upon the evidence heard we make the following findings of fact: We find that the Secretary of Agriculture caused to be sent to his private office for his use and consideration in connection with the performance of his function the full transcript of all the testimony taken in the proceeding, together with the exhibits; that he was advised by the Solicitor of the Department of Agriculture [2] that his duty was a personal one and that the order must be *his* order based on *his* consideration of the record; that the Secretary personally read and considered a transcript of the whole of the oral argument before the Assistant

[2] Hon. Seth Thomas, now United States Circuit Judge in the Eighth Circuit, was then Solicitor of the department. His testimony especially is significant.

Secretary and the briefs of the parties (in which oral arguments and briefs were such summaries of the evidence as the parties desired to incorporate therein); that, in addition to his study of oral arguments and briefs the Secretary studied and considered findings made by competent subordinates in the Department of Agriculture resulting from a sifting and analyzing of all the evidence; and that, further, he considered an oral review and discussion of all the evidence by other competent subordinates who personally had read every line of testimony and inspected each exhibit, and that he supplemented all of the foregoing by himself reading and considering parts of the transcript of the oral testimony.

CONCLUSION OF LAW

Based upon the findings of fact, we conclude as a matter of law that the Secretary gave plaintiffs that hearing to which the law entitled them.

2. Obviously the only "further proceedings" in this court contemplated by the Supreme Court were such as would be necessary to determine the issue newly to be made following the handing down of the opinion of the Supreme Court. If, however, as is contended by learned counsel for plaintiffs, the cause really has been remanded, not for "further proceedings" to "determine whether plaintiffs had a proper hearing" but for a rehearing, then, as to all issues, there has been accorded such a rehearing. We have reached the same conclusions on

the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference.

3. Exceptions are allowed to the conclusion of law newly stated here and also to those herein incorporated by reference.

Counsel for defendants will submit for approval and entry an appropriate form of decree dismissing the bills.

VAN VALKENBURGH, Circuit Judge, dissenting.

I am unable to conclude from the testimony at this rehearing that the Secretary of Agriculture gave to the determination of this matter the personal consideration which is his duty under the provisions of the Packers and Stockyards Act as construed by the Supreme Court. It is not an impersonal obligation. The proceeding has a quality resembling that of a judicial proceeding, in which the one who decides shall be bound to reach his conclusion "uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action." The proceeding is not one of ordinary administration but looks to legislative action, in which the Secretary is the agent of Congress in the fixing of rates for market agencies. So that, as said by the Supreme Court, the authority conferred by the Act is not given to the Department of Agriculture, as a department in the administrative sense, but to the Secretary him-

self as the legislative agent of the Congress. That duty "undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred." *Morgan* vs. *United States*, 298 U. S. 468, 482.

There can be no doubt that, at the time of original trial in this court, it was the theory of the government, as expressed by its counsel, that the authority conferred by paragraph 310 of the Packers and Stockyards Act is given to the Department of Agriculture as a department in the administrative sense. This is apparent from the language of the motion to strike paragraph IV, among other parts of complainants' bill, "for the reason that the allegations contained in said portions of said petition are impertinent, redundant, incompetent, irrelevant, and immaterial to any issue which may properly be raised in this suit." This position was maintained on appeal before the Supreme Court, as appears from the argument of appellees reported in 298 U. S. at pages 469, 471. Counsel expressly referred to the language of this court to the effect "that the theory of these allegations is supported by nothing in the Act and that a construction of the Act inconsistent with that theory would destroy it altogether as a measure capable of practical administration." Counsel added in that presentation that to permit parties affected by "administrative decisions" thus to challenge orders, as

signed upon insufficient deliberation, "might well lead to the paralysis of *administrative* tribunals." [Italics supplied.] Obviously no distinction was made between departmental proceedings in an administrative sense, and those of a *quasi judicial* character.

It is impossible, in my judgment, to read the testimony of the Secretary without recognizing that he carried into the final determination reached this conception of the proceeding as one belonging to his department in an administrative sense. The examinations he made were casual and perfunctory in the extreme. He says his final determination represented his reactions to the findings of the men in the Bureau of Animal Industry. He accepted these findings because he regarded his subordinates as in a better position than himself to make the decision. In his view "the phrase 'Secretary of Agriculture' is perhaps used in connections with regard to laws of this sort in the broad sense as well as in the narrow sense."

While undoubtedly the Secretary may have such assistants to analyze and appraise evidence for his convenience and advice, this does not and should not mean that such appraisal may amount to final valuation, where the responsibility of decision is expressly addressed to the Secretary alone, sitting in a *quasi* judicial capacity. And this means a moral as well as a legal responsibility, where large interests, as here, are critically affected.

The findings accepted by the Secretary emphasize the importance and necessity of this market. If it is to be maintained, those who conduct it must receive a fair and reasonable return upon their services. This is true apart from a consideration of the question of confiscation as such. For this reason the conscientious judgment of the Secretary himself apart from his administrative character is demanded as a duty.

Of course the Secretary takes official responsibility when he signs any administrative order prepared by his department, but that is not the quality of responsibility demanded in a proceeding of this nature.

If it be true, as contended, that the Act cannot be administered except upon the superficial basis here disclosed, then legislation should be made to meet that situation. Necessarily I have made but brief reference to record contents in stating these conclusions. In my judgment the recitals of the Secretary as a whole confirm these views.

Being of opinion that the proceedings in this case differed in no substantial respect from those ordinarily involved in departmental administration, and that a serious condition in the life of this market has resulted from the purely casual and mechanical treatment it has received, I must respectfully dissent from the views expressed by my associates.

# In the District Court of the United States for the Western District of Missouri, Western Division

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In Equity No. 2328 and Related Cases Nos. 2329–78

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F. O. MORGAN, DOING BUSINESS AS F. O. MORGAN SHEEP COMMISSION COMPANY, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA AND THE SECRETARY OF AGRICULTURE, DEFENDANTS

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Before VAN VALKENBURGH, Circuit Judge, and REEVES and OTIS, District Judges

PER CURIAM: The matters for decision are the motion of the defendants for an order staying the distribution of impounded moneys and the motion of petitioners for their distribution. These matters arise in the manner now to be stated.

Under date of June 14, 1933, the Secretary of Agriculture issued an order fixing maximum rates and charges for stockyard services rendered by petitioners at the Kansas City Stockyards in Kansas City, Missouri. By bills filed July 19, 1933, petitioners sought injunctive relief against enforcement of that order. This Court (July 22,

1933) temporarily restrained its enforcement upon the following condition imposed in each of the companion cases—

> that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner.

By agreement of counsel the temporary restraining orders so conditioned, were continued in effect pending final hearing. Decrees dismissing the bills were entered December 20, 1934. (See this case, 8 F. Supp. 766.) Petitioners appealed. The Supreme Court on May 25, 1936, reversed the decrees and remanded the cases for a determination of the question whether the Secretary had accorded petitioners "a full hearing" as required by law. ~~292~~ 298 U. S. 468. After the remand and a presentation anew of all issues, this court held that petitioners had been accorded the hearing required by law and again entered decrees dismissing the bills (July 9, 1937). Petitioners again appealed. The Supreme Court on April 25, 1938 (—— U. S.

—), reversed outright the decrees of this Court, on the ground that the Secretary had not accorded the petitioners the "full hearing" required by law. On May 31, 1938, a petition for rehearing was denied and the cases remanded for further proceedings in accordance with the opinion of the Supreme Court. Pursuant to the mandate of the Supreme Court this Court now has entered its final decrees setting aside the decrees of July 9, 1937, and permanently enjoining the enforcement of the Secretary's order of June 14, 1933.

The Clerk of this Court has in his custody sums aggregating $586,093.32 paid to him by petitioners in accordance with the condition upon which restraining orders were issued, as above set out. Petitioners ask that the sums so deposited be returned to them. Defendants move that the distribution of the moneys be stayed until the termination of such litigation, if any, as shall follow an order the Secretary may make hereafter, after he has accorded petitioners such a hearing as is required by law (which now he offers to do), in which order he will prescribe the maximum rates and charges for stockyard services rendered by petitioners, the order to be retroactively effective as of and from June 14, 1933.

1. We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has en-

joined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined.

2. We do not consider that the Secretary's contention that he now can make an order prescribing rates and charges which shall be effective as of June 14, 1933, and which shall supersede rates and charges, lawfully in effect then and thereafter, has any shred of reason or law to support it. It is directly opposed to the very words of the Act authorizing the Secretary to prescribe rates and charges. The language of the Act is that the rates and charges the Secretary is authorized to pre-

scribe shall be determined and prescribed "after full hearing" (and there has been no such hearing), and that when they have been so determined and prescribed they shall "be *thereafter* observed."

Defendants' Motion for an Order Staying Distribution of Impounded Moneys is overruled. It is so ordered. An exception is allowed to defendants.

The motion (styled petition) of petitioners (styled plaintiffs) for an Order of Distribution is sustained in an order filed contemporaneously herewith. To that order defendants are allowed an exception.

_____ _____,
*United States Circuit Judge.*

_____ _____,
*United States District Judge.*

_____ _____,
*United States District Judge.*

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